

however, the 25 percent figure vastly understates the proportion of CLEC-served buildings housing business customers that use high-capacity services. Those customers make up a relatively small proportion of all business customers, and it is quite reasonable to assume that CLECs design their networks and extend their loops to address precisely those buildings where customers of high-capacity services are likely to be located.

Second, the market is far from static. CLECs can and routinely do extend their fiber networks to reach new end users – the fiber market is an inverse Field of Dreams, where CLECs will build if customers come.<sup>27</sup> WorldCom’s municipal networks “include spurs ... for connectivity to large buildings and office parks.” Intermedia will connect its fiber networks to “the main Class-A buildings in a downtown business district.” Time Warner’s network “typically extends beyond the ring all the way to end-user buildings.” MFN will “bring our fiber right up to our customers’ floors in their buildings and provide them with wall-to-wall seamless connectivity.” Fiberworks states that its network is “available” to all businesses that “pass within 6000 feet” and “provides the fiber-optic link from its access network directly into the building.” Level 3 has deployed “multi-conduit, upgradeable local city networks” in 26 cities, with plans for 30 more, which connect its “intercity network gateway sites to ILEC and CLEC central offices, long distance carrier POPs, buildings housing communication-intensive end users and Internet peering and transit facilities.” And Global Crossing is “constructing a series of city rings to

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<sup>27</sup> Moreover, CLECs will build in rural, urban, and urban areas, as evidenced by the examples cited at page 12 of the Fact Report.

provide connections on a building-to-building scale,” which will enable customers to “bypass [ ] the need for LEC local loops.”<sup>28</sup>

Third, as the Commission has recognized, wireless high-capacity loops are a real competitive presence in their own right and also can be used as a quick and inexpensive transition to serving a building by fiber.<sup>29</sup> Confirming this conclusion, XO Communications states that it “establishes a wireless link to buildings first and later builds fiber to the buildings after the company has reached its desired customer penetration rate to justify building.”<sup>30</sup>

In short, the marketplace evidence confirms that competitive high-capacity loop facilities are ubiquitously available to customers of these services. This is not a matter, as the Commission stated in the UNE Remand Order, of “some competitive LECs, in certain instances, [finding] it economical to serve certain customers using their own loops.”<sup>31</sup> A multitude of CLECs, in virtually any case where business customers demand high-capacity services, find it economical to serve those customers using their own or leased facilities. While CLEC local fiber may not reach every small town in the country (although it reaches some of them), it is present

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<sup>28</sup> See Fact Report at 12-21 for cites to source material and additional examples.

<sup>29</sup> See Amendment of the Commission’s Rules to Establish Competitive Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, 12 FCC Rcd 15568, 15701 & n.54 (1997) (“fixed wireless technology has developed to the point where it has the potential to provide a competitive alternative to the incumbent LEC network”); Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 00-289 (rel. Aug. 18, 2000), at E-2 (“Fifth CMRS Report”)(“[f]ixed wireless operators can act as strategic partners with wireline CLECs that wish to extend their fiber networks more cheaply to [buildings without fiber access]”).

<sup>30</sup> Fact Report at 14.

<sup>31</sup> UNE Remand Order, ¶ 184.

virtually everywhere there are business subscribers wanting high-capacity loops. Those customers, as the Commission has recognized, present a revenue opportunity that justifies the deployment of alternative high-capacity facilities. CLECs have seized on that opportunity to the point that ILEC high-capacity business loops are simply one option among many.

## **2. Cost and timeliness**

The marketplace evidence discussed above conclusively demonstrates that CLECs, in the real world, do not consider self-supply or third-party sources of high-capacity loops either too expensive<sup>32</sup> or not timely enough to compete effectively. The costs of building links from an existing ring to new customers are manageable – approximately \$5.25 per foot for trenching and fiber combined, or about \$30,000 for a one mile loop<sup>33</sup> – as is confirmed by the regularity with which CLECs do so. And fiber wholesalers – competitive fiber providers who have built metropolitan area networks in dozens of cities nationwide, connecting buildings in business areas to ILEC central offices, IXC POPs, and ISP facilities<sup>34</sup> – are a ready third-party source of cost-effective, timely supply of high-capacity loops.<sup>35</sup>

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<sup>32</sup> In considering the expense of using non-ILEC elements, the Commission must keep in mind the Supreme Court’s admonition that the Commission cannot base an impairment finding on “*any* increase in cost.” *AT&T v. Iowa Util. Bd.*, 119 S.Ct. 721, 735 (1999) (emphasis in original).

<sup>33</sup> See Petition of Bell Atlantic for Forbearance, filed Jan. 20, 1999, Attachment 1, Affidavit of Karl McDermott and William Taylor, at ¶ 27 (estimate of 3 dollars per foot for trenching and \$2.25 per foot for fiber).

<sup>34</sup> See Fact Report at 14-21 & Table 6. See Section II.B, *infra* for a detailed discussion of fiber wholesalers and their attractiveness as a non-ILEC source of supply of high-capacity facilities.

<sup>35</sup> For example, NEON can “provide its customers with fiber optic connectivity to virtually any location in its service territory” using a process that is “quick and efficient.” Fact Report at 16

(Continued...)

As one analyst has noted, “[w]e are seeing a new generation of metropolitan bandwidth operators that will provide 100 Mbps plus connectivity at low cost to end users”<sup>36</sup>; another very recently opined that “there is an avalanche of metro capacity being deployed.”<sup>37</sup> With these facilities in place (and constantly being expanded) both new entrants and established CLECs have an attractive alternative to incurring the expense of building their own networks. Instead, they can purchase as much capacity as they need, when and where they need it. The existence of such a wholesale market for a network element, as the CLECs themselves have recognized, precludes a finding of impairment.<sup>38</sup>

Fixed wireless also is a legitimate alternative to fiber (either temporarily or in the long-term. As discussed above, it permits CLECs to reduce expenses and time to market and serve customers who otherwise would be too costly to reach.<sup>39</sup> The Commission itself has concluded that fixed wireless allows “faster time to market advantage over fiber-based networks,”<sup>40</sup> and this is indisputably correct: “almost every business in a license area can be reached as soon as

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(...Continued)  
(citing an analyst’s report).

<sup>36</sup> Fact Report at 14 n. 72.

<sup>37</sup> Fact Report at 14, *quoting* J. Grubman, Salomon Smith Barney, *Grubman’s State of the Union*, at 15 (March 21, 2001).

<sup>38</sup> *See* UNE Remand Order, ¶ 56.

<sup>39</sup> *See* Fact Report at 13-14 (quoting an analyst’s report on WinStar as explaining that fixed wireless enables carriers “to serve customers located in buildings that are too small or far away from fiber rings to justify the cost of fiber deployment”).

<sup>40</sup> Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 13 FCC Rcd 19746, App. F, at F-12 (1998) (“Third CMRS Report”).

service is activated.”<sup>41</sup> Fixed wireless service is modular, scalable, movable and easier and cheaper than wireline loops to maintain.<sup>42</sup> The Commission’s primary objection to fixed wireless in the UNE Remand Order – that it is “not as widespread as the incumbent’s ubiquitous network”<sup>43</sup> – simply no longer holds true.<sup>44</sup> Fixed wireless is widely available and can be rapidly deployed to new locations.

### **3. Quality and network operations**

The UNE Remand Order did not express quality or operational concerns with respect to CLEC fiber loops, and no such concerns could be justified: CLEC fiber and ILEC high-capacity loops have equivalent functionality. The only quality concerns noted by the Commission with respect to alternative loop facilities related to fixed wireless, where the Commission suggested that wireless local loops could not carry more than four channels or provide high-capacity Internet connections.<sup>45</sup> Whatever merit this objection might have had at the time of the UNE

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<sup>41</sup> Fact Report at 23.

<sup>42</sup> See Fifth CMRS Report at E-1 (“Fixed wireless operators claim that their networks have a significantly lower cost structure than wireline systems for two primary reasons. First, wireless networks are free of the installation and maintenance costs incurred with wires. Second, unlike a wireline network in which an entire market must be wired before initiating service, the capital expenditures of a wireless network can be incrementally incurred as more customers are added.”).

<sup>43</sup> UNE Remand Order, ¶ 188.

<sup>44</sup> WinStar, to cite one example, covers more than 80 percent of the nation’s business market. Likewise, AT&T holds 38 GHz licenses in over 200 geographic areas, including 95 of the 100 largest metropolitan markets, and WorldCom and Sprint also have moved aggressively into fixed wireless. Fact Report at 14.

<sup>45</sup> UNE Remand Order, ¶ 188.

Remand Order, it no longer holds true. Fixed wireless loops offer greater capacity and speed than standard copper loops with equivalent quality of service.<sup>46</sup>

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CLECs relying on self-supply or third-party sources of high-capacity loops face no material diminution in their ability to compete in providing services using these facilities. Alternative sources of high-capacity loops are available wherever they are needed, can be deployed quickly and cost-effectively, and offer the same functionality as the ILEC's unbundled loop elements. Consequently, the Commission must find that high-capacity loops do not meet the impairment standard of Section 251(d)(2), as interpreted by the UNE Remand Order.

**B. Competitors Can Self-Supply Dedicated Transport Or Obtain Such Facilities From Third Parties With No Material Diminution in Their Ability To Provide Service.**

The UNE Remand Order characterized dedicated transport as being limited to “selected point-to-point routes, primarily in dense market areas” and concluded that “these facilities are not available, as a practical, economic, and operational matter, such that a requesting carrier’s ability to provide the services it seeks to offer would not be impaired without access to the incumbent’s ubiquitous transmissions facilities.” By way of further explanation, the Commission noted that “the competitive transport facilities that currently exist do not interconnect all of an incumbent

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<sup>46</sup> See Fifth CMRS Report at E-21 (“by adjusting factors such as cell size and transmission power, the networks can be engineered to the standard level of reliability in telecommunications networks, 99.999 percent”).

LEC's central offices and all interexchange carrier's points of presence within an MSA, or a substantial portion thereof."<sup>47</sup>

Twenty months after the UNE Remand Order, and more than two years after most of the data underlying that decision were gathered, the marketplace has changed dramatically. Today, alternative dedicated transport is available either through self-supply or from a large and ever-expanding number of fiber wholesalers virtually anywhere that a CLEC might require such transport. Moreover, these non-ILEC alternatives are cost-effective and may be deployed in a timely fashion, with no diminution in quality or network operations as compared to use of ILEC dedicated transport UNEs.

### **1. Ubiquity**

As explained above with respect to high-capacity loops, "ubiquity," in the context of dedicated transport, does not require that alternative facilities exist between each and every ILEC central office and each and every IXC POP. The UNE Remand Order appears to have been predicated on a fundamental misunderstanding of the ILEC's networks: first, every ILEC wire center is not connected directly to every IXC's POP; nor is every ILEC wire center directly connected to every other ILEC wire center. Furthermore, ILECs' dedicated transport revenues are highly concentrated in relatively few offices. Thus, the inquiry into alternative facilities must focus on the routes where dedicated transport in fact is used. When properly understood, it is impossible for the Commission to conclude that CLECs would somehow be impaired without access to an ILEC's transport facilities.

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<sup>47</sup> UNE Remand Order, ¶ 333.

CLECs with their own fiber facilities are collocated in a substantial number of BOC central offices: out of the 320 MSAs served by the BOCs, 183 (including 42 of the 50 largest MSAs, which account for 80 percent of total BOC special access revenues) have at least one fiber-based collocator (often more) in wire centers covering 30 percent of special access revenues in those MSAs and 154 (including 33 of the 50 largest, generating 64 percent of total BOC special access revenue) have such collocation in wire centers covering 65 percent of special access revenues in those MSAs.<sup>48</sup>

Based on similar collocation data, the Commission already has largely deregulated special access pricing in MSAs accounting for a substantial portion of special access revenues. unbundled ILEC facilities. Notably, the Act requires unbundling only when entry would be impaired without it, not simply to facilitate entry by an entity lacking in the resources or ingenuity of others who have succeeded in entering the market. The grant of pricing flexibility in diverse geographic markets alone should be sufficient to show that carriers are not impaired, not just in those wire centers but for the entire service. If the services are so competitive that no price restraint is necessary for the retail service for a large portion of the market, there can be no need for UNEs at artificially reduced prices at all. Having concluded that competition is sufficiently vigorous (without reliance on UNEs) to allow prices to be deregulated, the Commission cannot turn a blind eye to that same competition here.

In any event, beyond the collocation data, there is ample further evidence of the ubiquity of alternative dedicated transport facilities (including dark fiber). First, the growth in CLEC fiber networks since early 1999 (when the data in the UNE Remand record were compiled) has

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<sup>48</sup> Fact Report at 6-7 & Tables 4-5.



been most impressive. As of year-end 2000, CLECs had 218,000 fiber miles, compared to 160,000 two years earlier. There were 635 fiber networks in the top 150 MSAs (which account for 70 percent of the population), compared to 486 in early 1999. Seventy-seven of the top 100 MSAs now have at least three competitive fiber networks, 47 have at least five, and 27 have at least seven. The top 10 MSAs in the country now have an average of 14 fiber networks, compared to nine at the time the UNE Remand record was compiled; even MSAs 100-150 have an average of two competing fiber networks, as opposed to 1.75 two years ago.<sup>49</sup>

Second, as the Report explains, CLEC fiber rings “invariably connect[] to one or more interexchange carrier POPs” as well as multiple ILEC central offices, ISPs, and commercial buildings. A customer that is connected to this network accordingly can obtain a dedicated connection to any of these locations without traversing ILEC facilities of any kind.<sup>50</sup> Consequently, competing providers do not need to establish their own direct connections to every central office or every IXC POP; they simply need to utilize a competing fiber network that serves those locations.

Third, as noted in Section II.A above, a multitude of wholesale fiber providers have built metropolitan fiber rings in dozens of cities of all sizes – not just in the largest markets.<sup>51</sup> These

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<sup>49</sup> Fact Report at 10-11. Appendix B to the Fact Report lists CLEC fiber networks in the top 150 MSAs.

<sup>50</sup> Fact Report at 9-10.

<sup>51</sup> See Fact Report at 14-21 & Table 6. KMC, which has built fiber networks in 37 Tier 3 markets, is just one example of a company that focuses on deploying fiber in smaller cities. See “KMC Targets Efficiency in Face of Tough Market,” Telecommunications Reports, April 2, 2001, at 33-35 (citing KMC’s “full facilities-based approach,” which obviates the need for KMC to use ILEC facilities).

companies “provide, or will provide, advanced fiber-based transport services, including interoffice transport ... in virtually every region of the ‘lower 48’ and the District of Columbia.”<sup>52</sup> As numerous CLECs have stated in press releases and SEC filings, capacity from these wholesalers – and from additional suppliers, including IXC and utilities, who have been aggressively deploying local fiber facilities<sup>53</sup> – essentially eliminate the need for reliance on ILEC dedicated transport<sup>54</sup>:

- Allegiance, which has leased fiber from alternative suppliers in 19 markets, states that “[t]hese fiber rings are expected to provide Allegiance with a reliable diverse connection to most of its central office collocations throughout a market.”
- CTC recently purchased “local fiber in selected geographical areas of eastern Massachusetts, southern New Hampshire, southern Maine and Rhode Island” from a “number of dark fiber suppliers,” enabling it to “extend CTC’s existing high bandwidth fiber network backbone to Verizon local switching offices” and “eliminate the need for leased inter-office Verizon facilities.”
- Fiberworks is deploying, in fifteen cities in the southeast, “the most extensive all-fiber, all-optical ‘last mile’ metropolitan local access network in the United States” in order to “replac[e] the existing ‘last mile’ copper infrastructure with fiber.”
- American Fiber Systems is installing dark fiber rings in 131 cities in 41 states, connecting ILEC central offices with IXCs, ISPs, and utilities in order to provide customers an “optic network solution” that “eliminat[es] the frustration of dealing with ILECs and the expense of building your own network.”
- WinStar has entered a similar agreement with MFN for fiber to “replace high-cost leased facilities and dramatically expand our ability to provide end-to-end broadband services ....”

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<sup>52</sup> Petition of Coalition of Competitive Fiber Providers, *supra*, at 1.

<sup>53</sup> Fact Report at 20-22.

<sup>54</sup> See Fact Report at 15-21 for source references and additional examples.

Quite clearly, alternative transport facilities today extend well beyond “limited point-to-point routes.”<sup>55</sup> In addition, contrary to the Commission’s assessment almost two years ago, a “competitive wholesale market for alternative . . . dedicated transport” has in fact developed.<sup>56</sup> Likewise, the multitude of metropolitan fiber networks noted above and described more fully in the Fact Report belie the Commission’s outdated conclusion that “the ‘fiber frenzy’ and ‘bandwidth markets’ cited by incumbent LECs are largely limited to portions of inter-city, long-haul networks that do not ubiquitously reach the interoffice segments of the incumbent LEC’s network.”<sup>57</sup> Alternative dedicated transport today is ubiquitously available for entrance facilities and interoffice transport, in cities of all sizes, in varying capacities, on either a dark or a lit basis, from companies that act as wholesalers and from companies that self-supply.

Regardless, even if there are isolated pockets of demand in places where competitive fiber has not yet been deployed, the scope and scale of existing deployment is sufficient to show carriers are not impaired. As Chairman Powell has explained, evidence of facilities deployment “strongly suggests” that competitors “are not significantly impaired,” both in areas where they have deployed “and in areas in which they have not done so.”<sup>58</sup>

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<sup>55</sup> UNE Remand Order, ¶ 346.

<sup>56</sup> UNE Remand Order, ¶ 348.

<sup>57</sup> UNE Remand Order, ¶ 348.

<sup>58</sup> See 1999 FCC LEXIS 5663 at \*\*49.

## 2. Cost

In the UNE Remand Order, the Commission found that “replicating the incumbent’s vast and ubiquitous transport network would be prohibitively expensive ....” According to the Commission, deploying fiber is extremely costly, and competing transport providers must also incur significant expenses to collocate “in each end office.”<sup>59</sup> The Commission also suggested that CLECs would incur additional expenses “coordinating among multiple carriers in order to serve ubiquitously” and would “lose efficiencies they would otherwise achieve if they were able to aggregate their traffic over the facilities of one ubiquitous provider.”<sup>60</sup> None of these findings is true today.

As an initial matter, competing providers of dedicated transport need not replicate the entire ILEC interoffice network; they can concentrate their resources on the discrete set of wire centers that serve their customers. In addition, the tremendous growth in metropolitan fiber networks shows that carriers find the expense of deployment well worth undertaking – and, that they are continuing to receive financing for such deployment even in the face of a tight capital market. Once the initial investments have been made, and fiber is in the ground, the Commission itself has recognized that a CLEC’s incremental costs of serving any particular customer are extremely low,<sup>61</sup> enabling it to price its services aggressively.

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<sup>59</sup> UNE Remand Order, ¶¶ 356, 357.

<sup>60</sup> UNE Remand Order, ¶ 358.

<sup>61</sup> See *infra* note 65 and accompanying text.

Moreover, an individual CLEC's costs of providing alternative dedicated transport services can be kept to a minimum by leasing capacity from a fiber wholesaler, taking only as much capacity as it needs and scaling its network to match demand. Contrary to the assumptions underlying the UNE Remand Order, each CLEC does not need to deploy an entire interoffice network – and third-party suppliers are eager to market capacity to competitors even without being compelled to do so; indeed, for many of them, that is their business.<sup>62</sup>

At the same time, other marketplace developments are dramatically reducing the costs of deploying alternative fiber facilities. Most notably, in the past two years there has been an explosion of companies offering collocation sites and services outside ILEC central offices – two or more in 49 of the top 50 MSAs, and an average of at least 6 in the top 25 MSAs, but with a notable presence in smaller MSAs as well.<sup>63</sup> These “collocation hotels” “greatly facilitate bypass by giving multiple competitive local carriers and interexchange carriers points at which to interconnect.”<sup>64</sup> They “put telecom gear as close as possible to the incumbent central office without actually being there,” allowing “[m]ost new business telecom providers ... to bypass the traditional infrastructure.”<sup>65</sup> And, in those cases where CLECs still want to collocate in ILEC central offices, the costs of doing so have declined considerably, given such options as cageless and shared collocation and non-standard cage sizes.

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<sup>62</sup> Cf. UNE Remand Order, ¶ 351 (“to the extent that there may be excess capacity along these fiber routes, non-incumbent providers of competitive transport facilities are under no legal obligation to offer their excess capacity to their competitors”).

<sup>63</sup> See Fact Report at 8 & Appendix A.

<sup>64</sup> Fact Report at 8.

<sup>65</sup> *Id.* (citing trade press articles).

Technical changes also are driving down costs for alternative transport providers. As the FCC has noted, “advances in fiber and electronics have made expansion of transport capacity relatively inexpensive. Once a competitor has infrastructure in place, the marginal cost of adding customers is not significant, and competitors are not likely to lack sufficient capacity for an extended period.”<sup>66</sup> Moreover, new technologies promise to reduce even further the time and cost of fiber installation.<sup>67</sup>

Finally, there is no basis for concern that competitors are forced to manage piece-parts of networks from multiple suppliers. The fiber wholesalers and self-suppliers generally have extensive networks, minimizing the need for CLECs to manage multiple suppliers in a single MSA. In any event, CLECs using multiple suppliers (presumably across different MSAs) seem perfectly able to compete, as evidenced by the Allegiance and CTC examples cited above.

### **3. Timeliness**

In the UNE Remand Order, the Commission found that CLECs are impaired without access to ILEC dedicated transport elements because of delays due to the need to collocate in end offices and secure access to rights-of-way.<sup>68</sup> These concerns, to the extent they were ever valid, have been substantially ameliorated in the intervening 20 months.

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<sup>66</sup> Brief of FCC, *MCI WorldCom v. FCC*, Nos. 99-1395 et al. (D.C.Cir. filed Nov. 30, 2000).

<sup>67</sup> Fact Report at 13 (citing reports that CityNet Telecommunications has three agreements and is negotiating with 33 other cities to run fiber through sewer pipes using miniature robots).

<sup>68</sup> UNE Remand Order, ¶¶ 362-64.

First, the amount of collocation has increased substantially in the past two years. RBOCs now provide tens of thousands of collocation arrangements.<sup>69</sup> Indeed, SBC alone has more than doubled the number of collocation arrangements since 1999, from 5058 at year-end 1999 to 12,001 at year-end 2000. And Verizon has 12,665 arrangements as of January – more than a 150% increase over what it had at the end of 1999 (4979). Given the amount of in-place collocation, the implementation delays associated with establishing alternative transport facilities are largely in the past. Put another way, the timeliness issues have diminished in an inverse relationship to the growth in ubiquity.

Second, the time required to implement collocation requests has declined considerably in the past two years. In the UNE Remand Order, the Commission credited claims that collocation generally took six to twelve months.<sup>70</sup> Now, however, it has established a national standard.<sup>71</sup> While several ILECs have sought reconsideration (and received waivers) of that standard,<sup>72</sup> the

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<sup>69</sup> For example, as of August 2000, Verizon had completed 14,973 collocation applications and was processing 4,329 more. *See*, Verizon Petition for Reconsideration, CC Docket No. 98-147 (filed Oct. 10, 2000), Decl. of Karen Maguire at ¶ 5. As of March 31, 2001, BellSouth had provisioned 5330 collocation arrangements.

<sup>70</sup> The Joint Petitioners are unaware of any ILEC that imposes “governors” on the number of collocation applications that an individual entity may file. *Cf.* UNE Remand Order, ¶ 363 (finding that BellSouth limited collocation applications from individual requesting carriers to five per month).

<sup>71</sup> Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dkt No. 98-147, *Order on Reconsideration* (rel. Aug. 10, 2000).

<sup>72</sup> Verizon and SBC have received waivers requiring them to complete collocation provisioning in 76 to 91 business days. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, DA 00-2528 (rel. Nov. 7, 2000) at ¶ 13. BellSouth’s average provisioning time for initial collocation for the six months from October 1, 2000 through March 31, 2001 was 108 calendar days; its average provisioning time for augment collocation was 58 days. This is plainly a reasonable

(Continued...)

intervals under the interim standard or the one proposed in the petitions (as well as their actual performance) permit effective competition.<sup>73</sup>

Third, the proliferation of collocation hotels described above alleviates the need for CLECs to collocate in every end office where they want to provide transport. Because the collocation hotels themselves often are interconnected with the ILEC's central offices, a CLEC need only collocate in one collocation hotel in order to reach multiple central offices.

With respect to delays in accessing rights of way, the Joint Petitioners acknowledge that some municipalities take longer than they should to grant permits to lay fiber. Those delays, however, affect all carriers, not just CLECs. In addition, they rarely rise to the level cited in the UNE Remand Order – a single instance of a two-year delay.<sup>74</sup> Finally, the amount of fiber already in place greatly diminishes the impact of these delays on new entrants: a carrier seeking to enter a market can always obtain capacity from an existing supplier while it waits for approval to deploy its own facilities.

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(...Continued)

amount of time: “Carriers that seek collocation plan their network expansions far in advance because of the time needed to order equipment and construct outside plant. They are perfectly capable of timing their requests for collocation to coincide with these activities. . . .” Verizon Petition for Reconsideration, *supra*, at 11.

<sup>73</sup> In approving Verizon's 271 application for New York and SBC's 271 applications for Texas, Kansas, and Oklahoma, the Commission expressly found that these companies' collocation performance were consistent with the Act and the Commission's requirements.

<sup>74</sup> UNE Remand Order, ¶ 364.



#### 4. Quality and network operations

In part, the Commission based its impairment finding for dedicated transport on the assumption that “requiring requesting carriers to utilize a patchwork of competitive alternatives, to the extent they are available ... can result in a material degradation of quality ....”<sup>75</sup> As the record makes clear, this concern is no longer valid. There are sufficient, and sufficiently ubiquitous, transport alternatives today that a requesting carrier can use a single competing provider to supply all of its needs. In addition, even when CLECs choose to use multiple transport vendors, they experience no apparent diminution of service quality, as is evidenced by the CTC and Allegiance examples cited in the Fact Report and described in Section II.A above.<sup>76</sup>

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CLECs relying on self-supply or third-party sources of dedicated transport face no material diminution in their ability to compete in providing services using these facilities. Alternative sources of dedicated transport are available wherever they are needed, can be deployed quickly and cost-effectively, and offer the same functionality as the ILEC’s unbundled loops elements. Consequently, the Commission must find that dedicated transport does not meet the impairment standard of Section 251(d)(2), as interpreted by the UNE Remand Order.

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<sup>75</sup> UNE Remand Order, ¶ 365.

<sup>76</sup> Even if there were some marginal decrease in quality from using non-ILEC transport elements, which there is not, the Supreme Court has made clear that such immaterial effects cannot be the basis for an impairment finding. *Iowa Util. Bd.*, 119 S.Ct at 735.

### **III. CONTINUING TO REQUIRE ACCESS TO UNBUNDLED HIGH-CAPACITY LOOPS AND UNBUNDLED DEDICATED TRANSPORT WOULD DETER FACILITIES-BASED COMPETITION AND INVESTMENT IN BROADBAND FACILITIES.**

Even if the Commission concluded, contrary to the compelling evidence of facilities-based market competition, that requesting carriers are somehow impaired without access to unbundled high-capacity loops and dedicated transport, it still could not mandate access to such elements consistent with the Act. The Section 251(d)(2) impairment analysis is only the starting point. Under Section 251(c)(3), the Commission is both authorized and required to impose restrictions on access to UNEs where necessary to advance the Act's objectives.

As the Commission is well aware, "[a] fundamental goal of the Act is to promote investment and innovation by all participants in the telecommunications marketplace, and, in particular, to encourage rapid deployment of new telecommunications technologies."<sup>77</sup> Given this statutory imperative, the Commission properly has recognized that it must consider the impact of its unbundling rules on facilities-based competition:

We believe that it is the development of facilities-based competition that will provide both incumbent and competitive LECs with the incentives to innovate and invest in new technologies. Such innovation and investment will bring greater choices of telecommunication services and lower prices to a greater number of consumers.<sup>78</sup>

In the instant case, mandating unbundling of high-capacity loops and dedicated transport would be antithetical to Congress's overarching directive to promote facilities-based entry and its specific emphasis, in Section 706 of the 1996 Act, on deployment of advanced services. The

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<sup>77</sup> UNE Remand Order, ¶ 110.

<sup>78</sup> UNE Remand Order, ¶ 104.

social costs of unbundling where it is not necessary are decreased investment in facilities by both incumbent providers and competing carriers. Intrusive regulation, such as forced sharing of these facilities, would derail investment by penalizing CLECs who were brave enough to take the first step in deploying new broadband facilities and distorting incentives for ILECs to upgrade their facilities.

The Commission, of course, fully recognizes this. In declining to require ILECs to provide unbundled access to their packet switches (with limited exceptions), the Commission explained that it was seeking not to deter investment:

Despite the encouraging signs of investment in facilities used to provide advanced services ... regulatory action should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.<sup>79</sup>

In light of the evidence discussed in Section II, that same conclusion must be reached with respect to high-capacity loops and dedicated transport.

The disincentive to investment created by excessive unbundling is a particular concern for newer technologies and areas where demand is less robust or predictable. The impressive deployment of competitive fiber cited in Section II is certainly a sufficient base from which to conclude that the lack of ILEC facilities does not impair CLECs' ability to provide services. The Commission must recognize, however, that business demand for broadband capacity is growing

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<sup>79</sup> UNE Remand Order, ¶ 316. *See also* R. May, "Animal Advice," *Legal Times*, March 5, 2001, at 62 (suggesting that "the FCC has exhibited an irrational exuberance for retaining excessive regulatory control over the process of transitioning to a competitive environment" and urging the Commission to scale back its unbundling requirements).

dramatically and will require tremendous new resource commitments from ILECs and CLECs alike if it is to be satisfied. Yet those carriers will be loath to expand their existing investments and extend broadband facilities to new areas if mandatory unbundling of those facilities persists; ILECs will be dissuaded because they must incur all the risks but share all the benefits, and CLECs will be deterred because they cannot hope to compete with the availability of ILEC elements priced at TELRIC.<sup>80</sup>

Importantly, the incentive and ability to innovate – indeed, the future of the information economy – is inextricably linked with investment. Innovation, as Chairman Powell has recognized, can be even more important than price competition because it enables transformational changes in our economy.<sup>81</sup> George Gilder recently seconded this point, explaining that “[w]hen it comes to leading-edge services and technologies, narrow price competition is almost meaningless. Internet innovation means qualitative change, order-of-magnitude price reductions and constantly changing services ....”<sup>82</sup> To promote innovation, the Commission must avoid “intrusions and distortions from inapt regulation” and “be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not

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<sup>80</sup> The current disaster besetting the California energy market chillingly illustrates the dangers of artificial regulation that interferes with supply, especially when demand is growing.

<sup>81</sup> Powell Remarks, *supra*. See also Opening Statement of Michael K. Powell before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, March 29, 2001 (“We will redirect our focus onto innovation and investment. The conditions for experimentation and change and the flow of money to support new ventures have often been misunderstood or neglected. If the infrastructure is never invented, is never deployed, or lacks economic viability we will not see even a glimmer of the bright future we envision”).

<sup>82</sup> Gilder, *supra*.

prematurely conclude we are seeing a market failure ....”<sup>83</sup> Justice Breyer made the same point in his concurring opinion in *Iowa Utilities Board*: “Increased sharing by itself does not automatically mean increased competition. It is in the *unshared*, not the *shared*, portions of the enterprise that meaningful competition would likely emerge.”<sup>84</sup>

The Commission has stated that “[t]he purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with the ability to gain a sufficient volume of business to justify the economical deployment of their own facilities.”<sup>85</sup> Once that point has been reached, as it has for high-capacity loops and dedicated transport, the Commission must “reduce regulatory obligations ... as alternatives to the incumbent LEC’s network elements become available ....”<sup>86</sup> Doing so will assure that ILECs and CLECs alike face no arbitrary constraints on their incentives to invest and innovate. Failure to do so, in contrast, would create a market beset by uncertainty, regulatory entanglement, and continued dependence on ILEC networks where such dependence is economically unwarranted.

#### IV. CONCLUSION

Dramatic marketplace developments in the twenty months since adoption of the UNE Remand Order have obviated whatever need may once have existed for mandatory access to unbundled high-capacity loops and dedicated transport. To assure compliance with the Act and its underlying pro-competitive and deregulatory mandate, the Commission should hold that

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<sup>83</sup> Powell Remarks, *supra*.

<sup>84</sup> Concurring Opinion of Justice Breyer, *Iowa Util. Bd.*, 119 S.Ct at 754 (emphasis in original).

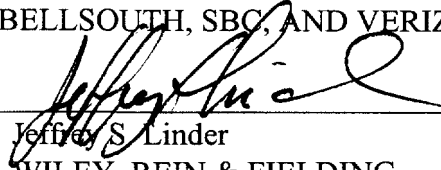
<sup>85</sup> UNE Remand Order, ¶ 52.

requesting carriers are not impaired by denial of access to these elements and therefore ILECs are not obligated to provide them as UNEs.

Respectfully submitted,

BELLSOUTH, SBC, AND VERIZON

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Their Attorneys

April 5, 2001

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(...Continued)

<sup>86</sup> UNE Remand Order, ¶ 110.

Attachment A:  
Telephone Companies of the Joint Petitioners

BellSouth telephone companies:

BellSouth Telecommunications, Inc.

SBC telephone companies:

Illinois Bell Telephone Company  
Indiana Bell Telephone Company, Incorporated  
Michigan Bell Telephone Company  
Nevada Bell Telephone Company  
Pacific Bell Telephone Company  
Southwestern Bell Telephone Company  
The Ohio Bell Telephone Company  
The Southern New England Telephone Company  
The Woodbury Telephone Company  
Wisconsin Bell, Inc.

Verizon telephone companies:

Contel of the South, Inc. d/b/a Verizon South Systems  
GTE Midwest Incorporated d/b/a Verizon Midwest  
GTE Southwest Incorporated d/b/a Verizon Southwest  
The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Hawaii Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.

**ATTACHMENT B:**

**COMPETITION FOR SPECIAL ACCESS SERVICE,  
HIGH-CAPACITY LOOPS, AND INTEROFFICE TRANSPORT**



Before the  
Federal Communications Commission  
Washington, D.C. 20554

**RECEIVED**

APR 5 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

|                                       |   |                     |
|---------------------------------------|---|---------------------|
| In the Matter of                      | ) |                     |
|                                       | ) |                     |
| Implementation of the Local           | ) | CC Docket No. 96-98 |
| Competition Provisions in the         | ) |                     |
| Telecommunications Act of 1996        | ) |                     |
|                                       | ) |                     |
| Joint Petition of BellSouth, SBC, and | ) | CC Docket No. ____  |
| Verizon for Elimination of Mandatory  | ) |                     |
| Unbundling of High-Capacity Loops     | ) |                     |
| and Dedicated Transport               | ) |                     |

**COMPETITION FOR SPECIAL ACCESS SERVICE, HIGH-CAPACITY  
LOOPS, AND INTEROFFICE TRANSPORT**

**Submitted by the United States Telecom Association**

**Prepared for BellSouth, SBC, Qwest, and Verizon**

**April 5, 2001**